Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO MT(3)22–52 OF 2008
ZAWAWI SALLEH J
25 MARCH 2010

Tort — Defamation — Libel — Publication of news report — Elements to maintain action in defamation — Whether established — Whether defence of qualified privilege available — Whether defendant acted with malice

The plaintiff, a practitioner of traditional medicine at Kampung Oren, Ulu Tiram, Johor, alleged that a news report (exh P1(B6)) published by the defendant were defamatory of him. The extract of the defamatory words are as follows: (a) 'A self-proclaimed spiritual healer had allegedly been taking advantage of his female followers for years in a commune in Ulu Tiram'; (b) 'Known as 'Nandu Bala' by his followers, the man apparently enjoyed his own mini harem in the commune and was surrounded by a coterie of bodyguards'; (c) 'The harem comprised women who sought treatment from him'; (d) 'According to the now 14-year-old girl, she and a few others were forced to take flower baths and engage in group chants and dance sessions. They were also forced to watch pornographic films with the man'; and (e) 'The girl said one night, she had followed a friend to a hostel room. When they were in the room, she was tied to a bed and raped by the spiritual healer'. The plaintiff alleged that he was known as 'Nandu Bala' by the residents of Kampung Oren, Ulu Tiram. The news report also makes specific reference to Kampung Oren in Ulu Tiram, Johor and readers with knowledge of special material facts did understand the news report to refer to him. The plaintiff claimed that his credit, character and reputation had been greatly injured and his office had been brought into hatred, ridicule and contempt. Therefore, the plaintiff claimed against the defendant, inter alia, general damages, exemplary and aggravated damages and injunction. The defendant contended that it never alleged that the plaintiff nor 'Nandu Bala' were guilty of the allegations. It merely reported the allegations made leading to the arrest by police of 'Nandu Bala'. The news report according to the defendant dealt exclusively with the wider issue of public interest. The defendant also denied that the words complained of was understood to bear the meaning ascribed to it by the plaintiff and that they are defamatory of him. Alternatively, the defendant relied on the defence of qualified privilege ('*Reynolds* privilege').

Held, dismissing the plaintiff's claim with costs:

(1) On plain reading of exh P1 (B6), it was clear that the news report merely

made an allegation of rape, among others, against the plaintiff as opposed to saying that the plaintiff was guilty of rape and several other allegations. This was clear from the heading of the news report by the use of the word 'alleges', including the use of the words in the body of the news report such as 'allegedly', 'apparently' and 'suspicion'. Thus, the 'sting' of the offending news report was that the plaintiff was merely suspected or alleged to have committed the several acts referred to and that the police have detained him merely for investigations (see para 18).

(2) The words complained of as contained in the offending news report, were not defamatory of the plaintiff because the said words were set out merely as allegations. Further, the words complained of when read in its context and as a whole, and giving its natural and ordinary meaning without construing it in detail and by way of inference, will not result in those reading it forming the view that the plaintiff was guilty of rape and the several other acts referred to, as this was far from being a fact and went outside the actual context of what was reported. Readers of the news report will not form the view that the plaintiff was guilty, purely on the basis that he had been detained for police investigations. The offending news was reported on a matter which actually took place, namely the plaintiff's detention by the police for investigations on suspicion of rape (see para 22(a), (d), (e) & (f)).

(3) The plaintiff had failed to establish two out of the three elements required in order to maintain a cause of action in defamation, specifically the first element and the third element. These are the requirements that 'the words used must be defamatory of the plaintiff' and 'that there was publication to a third person(s)' in the sense of the law of defamation (as opposed to the traditional sense). The failure of the plaintiff to establish any one of the three elements required was fatal to his case (see para 32).

(4) Before the defence of qualified privilege in the form of the *Reynolds* privilege could apply, two requirements must be shown to exist, namely, (a) that the publication concerned a matter of public interest; and (b) that the steps taken to gather, verify and publish the information were responsible and fair ('responsible journalism'). In this case, both the first and second requirements have been passed. The fact that a police report was lodged against the plaintiff by a 12 year-old girl alleging sexual impropriety and the fact that the plaintiff had been detained for investigations by the police on suspicion of raping her, as reported and published thereafter by the defendant in exh P1(B6), certainly concerned a matter of public interest. Further, the steps taken to gather, verify and publish the information were indeed responsible and fair in the circumstances. As such, the defendant are entitled to rely on the defence of qualified privilege (*Reynolds* privilege). The news report exh P1(B6) is

therefore protected by privilege and is immune from suit as it was published on an occasion of qualified privilege (see paras 39, 43–44 & 48).

[Bahasa Malaysia summary

Plaintif, seorang pengamal perubatan tradisional di Kampung Oren, Ulu Tiram, Johor, mendakwa bahawa laporan berita (eksh P1(B6)) yang diterbitkan oleh defendan-defendan mengenainya adalah fitnah. Keratan perkataan-perkataan fitnah adalah seperti yang berikut: (a) 'A self-proclaimed spiritual healer had allegedly been taking advantage of his female followers for years in a commune in Ulu Tiram'; (b) 'Known as 'Nandu Bala' by his followers, the man apparently enjoyed his own mini harem in the commune and was surrounded by a coterie of bodyguards'; (c) 'The harem comprised women who sought treatment from him'; (d) 'According to the now 14-year-old girl, she and a few others were forced to take flower baths and engage in group chants and dance sessions. They were also forced to watch pornographic films with the man'; and (e) 'The girl said one night, she had followed a friend to a hostel room. When they were in the room, she was tied to a bed and raped by the spiritual healer'. Plaintif mendakwa bahawa dia dikenali sebagai 'Nandu Bala' oleh penduduk-penduduk Kampung Oren, Ulu Tiram. Laporan berita juga membuat rujukan spesifik mengenai Kampung Oren di Ulu Tiram, Johor dan pembaca-pembaca dengan pengetahuan mengenai fakta material khusus memahami bahawa laporan berita tersebut merujuk kepadanya. Plaintif menuntut bahawa nama baik, keperibadian dan reputasinya telah dicemarkan dan pihaknya telah dibenci, dicemuh dan dikeji. Oleh itu, plaintif menuntut terhadap defendan, antara lain, ganti rugi am, teladan dan ganti rugi tambahan dan injunksi. Defendan-defendan berhujah bahawa ia tidak pernah mendakwa bahawa plaintif ataupun 'Nandu Bala' bersalah terhadap dakwaan-dakwaan tersebut. Ia hanya melaporkan dakwaan-dakwaan yang menjurus kepada penangkapan 'Nandu Bala' oleh polis. Laporan berita tersebut, mengikut defendan-defendan, berkaitan secara eksklusif kepada isu meluas kepentingan awam. Defendan-defendan juga menafikan bahawa perkataan-perkataan yang diadukan tersebut membawa maksud seperti yang dinyatakan oleh plaintif dan bahawa ia adalah perkataan fitnah mengenainya. Secara alternatif, defendan-defendan bergantung atas pembelaan perlindungan bersyarat ('perlindungan *Reynolds*').

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Membaca sekilas lalu eksh P1(B6), jelas bahawa laporan berita tersebut hanya membuat tuduhan rogol, antara lain, terhadap plaintif bertentangan dengan menyatakan bahawa plaintif bersalah atas tuduhan rogol dan beberapa tuduhan lain. Ini adalah jelas daripada tajuk laporan berita dengan penggunaan perkataan 'alleges', termasuk penggunaan perkataan-perkataan di dalam isi laporan berita tersebut seperti

'allegedly', 'apparently' and 'suspicion'. Oleh itu, 'sting' laporan berita yang menyinggung tersebut adalah bahawa plaintif hanya disyaki atau dituduh melakukan beberapa tindakan yang dirujuk dan polis menahannya hanya untuk siasatan (lihat perenggan 18).

(2) Perkataan-perkataan yang diadukan seperti yang terkandung di dalam laporan berita yang menyinggung tersebut, bukan pernyataan fitnah terhadap plaintif kerana perkataan-perkataan tersebut dinyatakan hanya sebagai tuduhan-tuduhan. Selanjutnya, perkataan-perkataan yang diadukan apabila dibaca di dalam konteksnya dan secara keseluruhan, dan dengan memberi maksud lazim dan biasa tanpa mentafsirnya secara terperinci dan melalui inferens, tidak akan mengakibatkan kepada sesiapa yang membacanya membentuk pandangan bahawa plaintif bersalah atas tuduhan rogol dan beberapa tindakan yang dirujuk kepadanya, kerana ini tidak menjadi fakta dan keluar daripada konteks sebenar apa yang dilaporkan. Pembaca-pembaca laporan berita tersebut tidak akan membuat tafsiran bahawa plaintif bersalah, semata-mata atas dasar bahawa dia telah ditahan untuk siasatan polis. Berita yang menyinggung tersebut telah dilaporkan atas perkara yang sebenarnya terjadi, iaitu penahanan plaintif oleh polis untuk siasatan kerana disyaki merogol (lihat perenggan 22(a), (d), (e) & (f)).

(3) Plaintif telah gagal membuktikan dua daripada tiga unsur yang dikehendaki supaya dapat mengekalkan kausa tindakan dalam fitnah, terutamanya unsur pertama dan unsur ketiga. Ini adalah keperluan bahawa 'the words used must be defamatory of the plaintiff' dan 'that there was publication to a third person(s)' dalam pertimbangan undang-undang fitnah (berbanding dengan pertimbangan tradisional). Kegagalan plaintif untuk membuktikan salah satu daripada tiga unsur yang dikehendaki adalah mencacatkan kesnya (lihat perenggan 32).

(4) Sebelum pembelaan perlindungan bersyarat di dalam bentuk perlindungan *Reynolds* dapat diaplikasikan, dua keperluan mesti ditunjukkan wujud, iaitu (a) bahawa penerbitan tersebut berkaitan perkara kepentingan awam; dan (b) bahawa langkah-langkah yang diambil untuk mengumpul, menentusahkan dan menerbitkan maklumat adalah bertanggungjawab dan adil ('kewartawanan yang bertanggungjawab'). Dalam kes ini, kedua-dua keperluan pertama dan kedua telah dipatuhi. Fakta bahawa laporan polis dibuat terhadap plaintif oleh budak perempuan berumur 12 tahun yang mendakwa salah laku seksual dan fakta bahawa plaintif telah ditahan untuk siasatan oleh polis kerana disyaki merogolnya, seperti yang dilaporkan dan diterbitkan kemudiannya oleh defendan-defendan di dalam eksh P1(B6), tentunya berkaitan perkara kepentingan awam. Selanjutnya, langkah-langkah yang diambil untuk mengumpul, menentusahkan dan menerbitkan maklumat dalam keadaan tersebut adalah sememangnya

bertanggungjawab dan adil. Oleh itu, defendan-defendan berhak bergantung kepada pembelaan perlindungan bersyarat (perlindungan *Reynolds*). Laporan berita eksh P1(B6) oleh itu dilindungi oleh kepentingan dan kebal daripada saman kerana ia diterbitkan dalam keadaan perlindungan bersyarat (lihat perenggan 39, 43–44 & 48).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 369–527.

Cases referred to

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ (Rep) 321, HC (refd)

Bonnick v Morris & Ors [2003] 1 AC 300, PC (refd)

Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3) [2005] 5 MLJ 561, HC (refd)

Dato' Wan Hashim bin Hj Wan Daud v Mazlan bin Ibrahim & Anor [1998] 1 MLJ 176, HC (refd)

Du Plessis and Others v De Klerk and Another 1996 (3) SA 850, CC (refd)

Edward Seaga v Leslie Harper, Privy Council Appeal No 90 of 2006 [2008] UKPC 9 (refd)

Grant v Torstar Corp 2009 SCC 61, SC (refd)

Halim bin Arsyat v Sistem Televisyen Malaysia Bhd & Ors [2001] 6 MLJ 353, HC (refd)

Hoe Thean Sun & Anor v Lim Tee Keng [1999] 3 MLJ 138, HC (refd)

Ismail bin Shamsudin v Abdul Aziz bin Abdan and other suits [2007] 3 MLJ 512; [2007] 8 CLJ 65, HC (refd)

Kian Lup Construction v HongKong Bank Malaysia Bhd [2002] 7 MLJ 283; [2002] 7 CLJ 32, HC (refd)

Lange v Atkinson [2000] 1 NZLR 257, PC (refd)

Lange v Atkinson [1998] 3 NZLR 424, CA (refd)

Lange v Atkinson [2000] 3 NZLR 385, CA (refd)

Lange v Australian Broadcasting Corp (1997) 145 ALR 96, HC (refd)

Leech v Independent Newspapers (Ireland) Ltd [2007] 1 EHC 223, HC (refd)

National Media Ltd and Others v Bogoshi 1998 (4) SA 1196, SCA (refd)

Nirumalan K Pillay & Ors v A Balakrishnan & Ors [1997] 1 SLR 322, HC (refd)

Reynolds v Times Newspapers Ltd [2001] 2 AC 127, HL (folld)

Soh Chun Seng v CTos-Emr Sdn Bhd [2003] 4 MLJ 180; [2004] 5 CLJ 46, HC (folld)

Tan Sri Dato' Tan Kok Ping, JP lwn The New Straits Times Press (M) Bhd dan lain lain dan satu lagi guaman [2010] 2 MLJ 694; [2010] 3 CLJ 614, HC (refd)

Legislation referred to

Federal Constitution art 10(1)(a), (2)(a)

Rules of the High Court 1980 O 78 r 3(3)

Jagatheason Ramiah (Chand, Jag & Associates) for the plaintiff.
Rueben Mathiavaranam (Rueben Williams) for the defendant.

Zawawi Salleh J:

INTRODUCTION

[1] Freedom of expression is guaranteed by art 10(1)(a) of the Federal Constitution. It is essential to the functioning of our democracy, to seeking the truth in diverse fields of inquiry and to our capacity for self-expression and individual realisation.

[2] But freedom of expression is not absolute. In cl (2)(a) of art 10of the Federal Constitution, in connection with the freedom of expression, there is reservation to Parliament within the constitution to impose such restrictions 'as it deems necessary or expedient in the interest of the security of the Federation ... public order or morality' and 'further restrictions ... to provide against ... incitement to any offence', in addition to the restrictions in art 10(2)(a), the law of defamation protects a person's reputation from unjustified assault. The law of defamation does not forbid people from expressing themselves. It merely provides that if a person defames others, that person may be required to pay damages to the other for the harm caused to the other's reputation.

[3] This case requires the court to balance the right of the press to impart information of general interest and the right of the public to be informed against the single individual's reputation from unjustified assault. Two conflicting values are at stake — on the one hand freedom of expression and on the other hand the protection of reputation. While freedom of expression is a fundamental right protected under art 10(1)(a)of the Federal Constitution, courts have long recognised that protection of reputation is also worthy of legal recognition.

BACKGROUND FACTS

[4] The plaintiff is a practitioner of traditional medicine having an address at No 1, Jalan Melor 5, Kampung Oren, 81100 Ulu Tiram, Johor. The defendants are owners, publishers and printers of 'the New Straits Times' ('the *NST*'), an English newspaper with widespread circulation. The newspaper is also published by the defendants on the internet.

[5] On 10 August 2007, the defendants published in the *NST* a news report (exh P1(B6)) as follows:

HEALER HELD AFTER GIRL, 12, ALLEGES RAPE

By Dean Dinesh

news@nst.com.my

Johor Baru: A self-proclaimed spiritual healer had allegedly been taking advantage of his female followers for years in a commune in Ulu Tiram.

Known as 'Nandu Bala' by his followers, the man apparently enjoyed his own mini harem in the commune and was surrounding by a coterie of bodyguards.

The harem comprised women who had sought treatment from him. His exploits, however, came to an abrupt end on Tuesday when police arrested him on suspicion of raping a 12-year-old girl.

The girl had apparently followed her parents to see the man for spiritual healing two years ago. They were allegedly told to stay in a hostel at the commune in Kampung Oren to enable him to treat them. The family lived in the commune from May 2005 to July last year.

According to the now 14-year-old girl, she and a few others were forced to take flower baths and engage in group chants and dance sessions. They were also forced to watch pornographic films with the man.

The girl said one night, she had followed a friend to a hostel room. When they were in the room, she was tied to a bed and raped by the spiritual healer.

Last July, the girl's farther began to realise that the man was making use of him and his family and decided to escape from the commune with his family.

'Then, several days ago, I found a letter in which my daughter had poured her heart out. She was planning to send the letter to the police'.

'I confronted her about it. That was when she told me about the incident'.

Johor Baru (South) Criminal Investigation Department Chief Deputy Superintendent Nor Hashim Mohammad confirmed the arrest.

[6] The plaintiff alleges that the news report makes reference to one 'Nandu Bala' as the alleged wrongdoer. The plaintiff is known as 'Nandu Bala' by residents of Kampung Oren, Ulu Tiram. The news report also makes specific reference to Kampung Oren in Ulu Tiram, Johor and readers with knowledge of special material facts did understand the news report to refer to him.

[7] The plaintiff claims that certain words ('the words complained of') contained in the news report are defamatory to him. These words are as follows:

(a) A self-proclaimed spiritual healer had allegedly been taking advantage of his female followers for years in a commune in Ulu Tiram;

(b) Knows as 'Nandu Bala' by his followers, the man apparently enjoyed his own mini harem in the commune and was surrounding by a coterie of bodyguards;

(c) The harem comprised women who sought treatment from him;

(d) According to the now 14 year old girl, she and a few others were forced to take flower baths and engage in group chants and dance sessions; and

(e) The girl said one night, she had followed a friend to a hostel room. When they were in the room, she was tied to a bed and raped by the spiritual healer.

[8] The plaintiff also claims that the words complained of in their natural and ordinary meaning, are understood to mean:

(a) that the plaintiff is an unscrupulous individual who practices deceit in the name of religion for sexual gratification;

(b) that the plaintiff is a rapist and has committed unlawful sexual intercourse with an underage girl;

(c) that the plaintiff had possessed a harem and hence practiced free sex;

(d) that the plaintiff had falsely kept and/or imprisoned individuals against their free will and made use of them for his own personal gratifications; and

(e) that the plaintiff had tricked an underage girl and others and engaged them in immoral sexual activity in the name of religion.

[9] The plaintiff claims that his credit, character and reputation has been greatly injured and his office has been brought into hatred, ridicule and contempt. The plaintiff claims against the defendants, inter alia, general damages, exemplary and aggravated damages, costs, interest, and injunction.

[10] The defendants admit publishing the news report but deny that the plaintiff is the person referred to as 'Nandu Bala' in the news report and the news report refers to the plaintiff. The defendants contend that the news report was not concerned with the plaintiff nor 'Nandu Bala' but dealt exclusively with the wider issue of public interest. It never alleged that the plaintiff nor 'Nandu Bala' were guilty of the allegations. It merely reported the allegations made leading to the arrest by police of 'Nandu Bala'.

[11] The defendants deny that the words complained of is understood to bear the meaning ascribed to it by the plaintiff and that they are defamatory of him. Alternatively, the defendants rely on the defence of qualified privilege ('*Reynolds* privilege').

DISCUSSION

[12] It is trite law that in order to establish a cause of action in defamation, the plaintiff must prove three elements, namely, that:

(a) the statement must bear defamatory imputations;

(b) the statement must refer to the plaintiff, and

(c) the statement must be published to third person(s) by the defendants.

(See *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 at p 318; [1989] 1 CLJ (Rep) 321 at p 324; *Kian Lup Construction v HongKong Bank Malaysia Bhd* [2002] 7 MLJ 283 at p 292; [2002] 7 CLJ 32 at p 41; *Ismail bin Shamsudin v Abdul Aziz bin Abdan and other suits* [2007] 3 MLJ 512 at p 515; [2007] 8 CLJ 65 at pp 68–69.

[13] Learned counsel of the plaintiff submits that when the news report is read as a whole, there can be no doubt that the news report is defamatory of the plaintiff. It clearly conveys to the ordinary reader the meaning as set out by the plaintiff in A20, paras 9–10. In his rhetoric submission, learned counsel of the plaintiff posits that the news report could not be any worse in tarnishing the plaintiff's reputation. The plaintiff was so tarnished and it cuts across almost all things despised of a man by the general public. It is highly vitriolic and clearly written with a view to inflicting the maximum damage possible on a man.

[14] Learned counsel of the defendants submits that in deciding whether or not the words complained of are defamatory, one must take into account not only the actual words used, but the context of the words. The plaintiff cannot pick and choose parts of the publication standing in isolation and claim they are defamatory. The whole article or news report must be considered in its entirety.

[15] Learned counsel of the defendants further submits that when read as a whole and in its context, the news report does not convey the defamatory meanings which the plaintiff claims.

[16] I am entirely in agreement with the submission of learned counsel of the defendants that the court must construe the entirety of exh P1 and ask if an ordinary, reasonable and fair-minded person who reads the whole of exh P1 would discern the meaning as alleged by the plaintiff. There is a passage in the judgment of Ramly Ali J (as he then was) in the case *Soh Chun Seng v CTos-Emr Sdn Bhd* [2003] 4 MLJ 180 at pp 187–188; [2004] 5 CLJ 46 at pp 53–55 that merits reproduction. There, His Lordship had this to say:

> ... In construing the meanings of the words complained of as pleaded by the plaintiff, the court must do so in the context the entirety of the contents of exh P2.
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> In *Gatley on Libel and Slander*, (9th Ed) at p 96 the learned author states:
>
> > It is necessary to take into consideration, not only the actual words used, but the context of the words.

At p 97, the learned author continues:

> It follows from the fact that the context and circumstances of the publication must be taken into account and that the plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory. This or that sentence may be considered defamatory, but there may be other passages which take away the sting.

Our courts have also pronounced the same principle to be the law applicable in Malaysia. In *Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors* [1999] 3 MLJ 529; [1999] 8 CLJ 499, Kamalanathan Ratnam J at p 534 (MLJ); p 504 (CLJ) stated that:

> I agree that the test to be applied when considering whether a statement is defamatory of a plaintiff is an objective one in that it must be given a meaning in which a reasonable man would understand it (see *Gatley on Libel and Slander* (9th Ed) para 3.12) and that for this purpose, that is, in considering whether the words complained of contained any defamatory imputation, it is necessary to consider the whole article.

In another case, *Noor Asiah bte Mahmood & Anor v Randhir Singh & Ors* [2000] 2 MLJ 175; [2000] 5 CLJ 407 the High Court has also stated:

> I must hasten to add that the same authority reflected the view that a claim for libel whilst not to be founded on a headline or photograph in isolation from the related text, the question whether the article was defamatory had to be answered by reference to the response of the ordinary reasonable reader to the entire publication.

In construing the words complained of to determine if they are capable of bearing defamatory meanings or not, the court must also endeavour to read those words through the eyes of the 'hypothetical reasonable person'. In *Gatley on Libel and Slander* (9th ED) at p 80, the learned author opines as follows:

> If words conveyed a defamatory imputation to those to whom they were published, but would not have done so to the hypothetical reasonable person in that position, they are not defamatory. The essence of libel is the publication of written words to a person or persons by whom they would be reasonably understood to be defamatory of the plaintiff so that the mere fact that the hearers understood the language in a defamatory sense does not make it defamatory unless they were reasonably justified in so understanding it. In the case of words defamatory in their ordinary sense it is not permissible to call evidence to prove that anyone did understand the words in a defamatory sense, but the question is simply whether reasonable people would have so understood them.

At p 81, the learned author of *Gatley* postulates the following question as an appropriate one to ask in trying to get the natural and ordinary meaning of the words complained of. The question is:

> What would the words convey to the mind of the ordinary, reasonable, fair-minded reader.

In my earlier decision in *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283; [2002] 7 CLJ 32 I had adopted the same approach proposed by the learned author of *Gatley* as stated above.

At p 293 (MLJ); p 42 (CLJ) of *Kian Lup Construction* case I have stated the followings:

> In determining the issue, this court does not look to the actual effect of the allegation on the person's reputation, or the meaning of the words actually understood or taken by the listeners (see *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334). It is not enough that the listeners actually take the words in defamatory sense, for they must be reasonably justified in so understanding the words before they are found to be defamatory (see *The Straits Time Press (1975) Ltd v The Workers' Party & Anor* [1987] 1 MLJ 186).

The court is also of the view that in construing what the words complained of might reasonably mean, such meanings that can only be arrived at by a strained or utterly unreasonable interpretation are to be rejected. I find support for this view in the decision of Suriyadi Halim Omar J in *Pang Fee Yoon v Piong Kien Siong & Ors* [1999] 3 MLJ 189; [1999] 8 CLJ 383. In that case it was held:

> How to arrive at their natural and ordinary meaning again is no easy matter, but necessitates the presiding judge to scrutinise the words. There should not be any unnecessary intellectual exercise to arrive at the meanings of those words. In other words, the whole process should be effortless. For this purpose courts must reject meanings which can only emerge as a product of some strained or forced or utterly unreasonable interpretation.

Similarly, in *Le Mercier's Fine Furnishing Pte Ltd & Anor v Italcomm (M) Sdn Bhd* [1996] MLJU 365; [1996] 3 CLJ 590, James Foong J at p 593 stated:

> It is also necessary in considering this issue on the meaning, the court must not put a strained or unlikely construction upon the words ...

[17] I gratefully adopt the speech of His Lordship Ramly Ali J (later JCA) in that case.

[18] To my mind, on plain reading of exh P1, it becomes clear that the news report merely makes an allegation of rape, among others, against the plaintiff as opposed to saying that the plaintiff is guilty of rape and several other allegations. This is clear from the heading of the news report by the use of the word 'alleges', including the use of the words in the body of the news report such as 'allegedly' (first paragraph), 'apparently' (second paragraph), 'suspicion' (third paragraph) and 'allegedly' (fourth paragraph). Thus, the 'sting' of the offending news report is that the plaintiff is merely suspected of alleged to have committed the several acts referred to and that the police have detained him merely for investigations.

[19] My conclusion above is fortified by the evidence of the plaintiff's own witnesses namely SP1 and SP2, all of whom agreed during cross-examination that when read as a whole and in its context, the offending news report (exh P1(B6)) merely contained allegations against the plaintiff as opposed to factual statements imputing guilt on the plaintiff. This is what they had to say:

(i) SP1

Saya bersetuju bahawa berita seperti yang terdapat di perenggan pertama, kedua dan keempat (of the offending news report) hanyalah pengataan ('allegation') sahaja.

(ii) SP2

Saya setuju apabila Ekshibit P1 dibaca secara keseluruhan dan di dalam konteksnya, Sivabalan (Plaintif) hanya dikatakan syaki melakukan perbuatan tersebut sahaja.

[20] As for SP3, when asked during cross-examination if he could read and understand English, his answer was 'Saya tidak boleh membaca dan memahami Bahasa Inggeris'.

[21] As for SP4, she had disagreed when it was put to her during cross-examination that the offending news report contained merely allegations against her husband (the plaintiff) as opposed to factual assertions. However, when asked to point out where in exh P1(B6) it is stated that the plaintiff committed rape, she merely had this to say:

Saya tidak boleh membaca tapi saya cuma tahu di perenggan kedua ada menyebut nama suami saya.

From the answer given above by SP4, it can be concluded that she too could not read nor understand English. The following question put to SP4 during cross, elicited an answer from her which clearly supports this conclusion:

S: Saya cadangkan kepada kamu bahawa kamu tidak boleh membaca dan memahami Bahasa Inggeris?

A: Ya, saya tidak boleh membaca Bahasa Inggeris tetapi boleh memahaminya.

[22] In view of that which is stated above, I am of the considered opinion that the words complained of contained in the offending news report (exh P1(B6)) in the instant case, are not defamatory of the plaintiff due to the following reasons:

(a) The words complained of are set out merely as allegations, and this is clear when the news report (exh P1(B6)) is read in its context and as a whole;

(b) The 'sting' of the offending news report (exh P1(B6)) is that the plaintiff is merely suspected or alleged to have committed the several acts referred to;

(c) The above is also supported by the testimony of the plaintiff's own witnesses namely SP1 and SP2;

(d) When read in its context and as a whole, and giving it its natural and ordinary meaning without construing it in detail and by way of inference, the words complained of contained in the news report (exh P1(B6)) will not result in those reading it forming the view that the plaintiff was guilty of rape and several other acts referred to, as this was far from being a fact and went outside the actual context of what was reported;

(e) Readers of the news report (exh P1(B6)) will not form the view that the plaintiff was guilty, purely on the basis that he had been detained for police investigations. The fact that the plaintiff was detained merely for police investigations was confirmed by the plaintiff (SP5) in his evidence-in-chief (SP5, Q & A3) as well as South Johor Bahru Criminal Investigation Head, District Police Headquarters, DSP Nor Hashim bin Mohammad (SD2) during his evidence-in-chief (SD2, Q & A4); and

(f) The offending news report (exh P1(B6)) reported on a matter which actually took place, namely the plaintiff's detention by the police for investigations on suspicion of rape. This was confirmed by DSP Nor Hashim bin Mohammad (SD2) during his evidence-in-ehief (SD2, Q & A4). Investigations alone did not mean that the plaintiff was guilty of the allegations. This was subsequently borne out when the plaintiff was released with no further action being taken against him as confirmed by the plaintiff (SP5) himself in his evidence-in-chief (SP5, Q & A7).

[23] Accordingly, the court holds that the plaintiff has failed to establish that the first element required in order to maintain a cause of action in defamation.

WHETHER THE STATEMENTS REFER TO THE PLAINTIFF

[24] To his credit, learned counsel of the defendants concedes that the offending news report does indeed refer to the plaintiff. The plaintiff produced four witnesses, all residents of Kampung Oren in Ulu Tiram, Johor from where the plaintiff hails, who testified that the plaintiff is also known as 'Nandu Bala'. Hence, although the news report does not name the plaintiff specifically but merely refers to one 'Nandu Bala', the fact that the plaintiff is known as 'Nandu Bala' cannot be denied in view of the evidence given by Devasaki a/p Supramaniam (SP1), Norasidah bt Ibrahim (SP2), Mano a/l Maniam (SP3) and Valli a/p Krishnan (SP4).

[25] Accordingly, the court holds that the second element required in order to establish a cause of action in defamation is satisfied.

WHETHER THE STATEMENTS WERE PUBLISHED TO THIRD PERSONS

[26] Learned counsel of the plaintiff submits that the defendants do not dispute that the *NST* has a wide publication including the internet edition. The defendants also do not dispute publishing the offending news report. Clearly, therefore, there has been publication to the general public who would no doubt have understood the news report and the meaning as pleaded in the plaintiff's statement of claim.

[27] In so far as the requirement of 'publication' to third persons (the third element) is concerned, learned counsel of the defendants submits that the law says that it is not sufficient that the word complained of contained in an offending article or news report be merely 'communicated to third parties'; it is also a requirement that it be communicated in such a manner that it conveys the defamatory meaning and that persons acquainted with the plaintiff must understand it to refer to him. Hence, if a defamatory publication was handed to a person who could not read or could not read the language in which it was written, there would be no publication. To support his argument, learned counsel cited the following authorities:

(a) *Gatley on Libel and Slander* (10th Ed) para 6.1, p 142;

(b) *Duncan and Neill on Defamation* (3rd Ed) para 5.40, p 53; and

(c) *Evans on Defamation in Singapore and Malaysia* by Doris Cheah and Rueben Mathiavaranam (3rd Ed) p 67.

[28] The court agrees with the submission. The evidence adduced before the court reveals that of the four witnesses produced by the plaintiff, that is to say SP1, SP2, SP3 and SP4, three of them, namely SP1, SP3 and SP4 do not read and/or understand English. In so far as SP1 is concerned, she had testified during cross-examination as follows:

> Saya ada membaca berita tersebut tetapi saya kurang faham dan saya suruh suami saya membaca dan menerangkannya.
>
> Ada perkataan-perkataan yang saya tidak faham maka saya menyuruh suami saya menerangkannya.

Further, when asked to read the offending news report (exh P1(B6)), SP1 found it to be a huge struggle.

[29] In so far as SP3 is concerned, he had testified during cross-examination as follows:

Saya tidak boleh membaca dan memahami Bahasa Inggeris.

[30] In so far as SP4 is concerned, when asked to point out during cross where in the offending article (exh P1(B6)) was it stated that the plaintiff had committed rape, she answered merely as follows:

Saya cuma tahu di perenggan 2 nama suami saya disebut.

[31] Thus, it clearly shows that SP1, SP3 and SP4 cannot read and/or understand English. This is further fortified by the fact that all three of them could not and did not testify in English, took their respective oaths in Tamil and required the services of a Tamil interpreter in court.

[32] Accordingly, the court holds that the plaintiff has failed to establish two out of the three elements required in order to maintain a cause of action in defamation, specifically the first element and the third element. These are the requirements that 'the words used must be defamatory of the plaintiff' and 'that there was publication to a third person(s)' in the sense of the law of defamation (as opposed to the traditional sense). The failure of the plaintiff to establish any one of the three elements required, is fatal to his case.

DEFENCE OF QUALIFIED PRIVILEGE

[33] Assuming that the plaintiff has established the cause of action against the defendants for defamations, the court shall now proceed to consider the defendants's defence of qualified privilege.

[34] On this point, it is appropriate to refer to the judgment of Lord Carswell in the case of *Edward Seaga v Leslie Harper, Privy Council Appeal No 90 of 2006* [2008] UKPC 9. There, His Lordship had this to say:

> (5) The defence of qualified privilege, like so many other doctrines of the common law, developed over a period of time, commencing in the 19th century, and is still in the process of development. The history is conveniently, summarised in the judgment of Dunn LJ in *Blackshaw v Lord* [1984] QB 1 at pp 33–34, drawing on the argument of Sir Valentine Holmes KC in *Pereira v Peiris* [1949] AC 1 at p 9. By the time of the decision of the Court of Appeal in *Purcell v Sowler* (1877) 2 CPD 215 it was assuming its recognisable modern form. It is founded upon the need to permit the making of statements where there is a duty, legal, social or moral, or sufficient interest on the part or the maker to communicate them to recipients who have a corresponding interest

or duty to receive them, even though they may be defamatory, so long as they are made without malice, that is to say, honestly and without any indirect of improper motive. It is the occasion on which the statement is made without the privilege, and under the traditional common law doctrine there must be a reciprocity of duty and interest: *Adam v Ward* [1917] AC 309 at p 334, per Lord Atkinson. The development of the law is accurately and conveniently expressed in *Duncan and Neill on Defamation* (2nd Ed) (1983), para 14.04:

> From the broad general principle that certain communications should be protected by qualified privilege 'in the general interest of society', the courts have developed the concept that there must exist between the publisher and the publishee some duty or interest in the making of the communication.

(6) The law has been slow to accept that a communication to the world at large, such as in newspaper, is protected by qualified privilege. It has traditionally been held either that there is no duty on the part of the maker to publish it so widely or that the bredth of the class of recipients is too wide for them all to have an interest in receiving it: see, eg, *Champman v Lord Ellesmere* [1932] 2 KB 431; and cf *Gatley on Libel and Slander*, (10 Ed) (2004) paras 14.6, 14.81. The submission has been advanced from time to time the law should recognise the existence of a species of qualified privilege founded upon a duty on the part of the maker of the statement to publish it to the world at large. This received some support from Pearson J in *Webb v Times Publishing Co Ltd* [1960] 1 QB 535 at p 568 and from Cantley J in *London Artist Ltd v Littler* [1968] 1 WLR 607 at p 619, but in *Blackshaw v Lord* [1984] QB 1 the Court of Appeal was cautious about accepting it as a general rule, while being prepared to acknowledge the existence of occasional exceptions (the examples usually given are *Cox v Feenev* (1863) 4 F & F 18; *Albutt v General Medical Council* (1989) 23 QBD 400 and *Webb v Times Publishing Co Ltd*). The germ of the idea of a privilege for reports to a wide range of readers or listeners where the circumstance warrant a finding of sufficient general public interest may, however, be seen in *Blackshaw v Lord*, a decision which merits more attention than it has hitherto received. To recognise such statements should be made, notwithstanding the risk that they may be defamatory of the subjects of the statements. Nevertheless, although attempts were made to move the law in this direction, it could not be said until the decision of the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 that a defence on these lines was available to those who published defamatory statements to the world at large.

(7) The plaintiff Mr Albert Reynolds is a former Irish Taoiseach, concerning whom a report was published in the British mainland edition of the Sunday Times containing allegations which the jury held were untrue. He awarded nominal damages, and the judge held after legal submissions that the defence of qualified privilege failed. The Court of Appeal allowed Mr Reynolds' appeal and ordered a new trial. They also held that the defendants would not be able to rely on the defence of qualified privilege. The publishers appealed to the House of Lords, where their counsel argued in favour of a new category of qualified privilege, applicable to occasions of dissemination of political information (a term and a category of privilege accepted by the High Court of

Australia in *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520). The House rejected this submission, but unanimously agreed that the traditional ambit of qualified privilege should be extended somewhat. The basis on which Their Lordships did so and the extent of the change in the law have been the subject of some debate since the decision was given, but these matters have become rather more clear since the House returned to the subject in *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44; [2007] 1 AC 359.

(8) Lord Nicholls of Birkenhead, who gave the main speech, considered the essential factors of freedom of expression, the importance of the role of the media in the expression and communication of information and comment on political matters, and the reputation of individuals as an integral and important part of their dignity. He concluded that the necessary balance between these factors could be achieved, while liberating the law to some extent from the traditional duty-interest concept of qualified privilege. He considered that the established common law approach remained essentially sound. What he proposed, with which the other members of the appellate committee agreed, was a degree of elasticity, adapting the common law test to afford some protection to what he described as 'responsible journalism'. The court is to have regard to all the circumstances when deciding whether the publication of particular material was privileged because of its value to the public.

(9) Lord Nicholls set out at p 205 a number of matters to be taken into account in coming to that decision. He made it clear that the list was not exhaustive, but was illustrative only, and the weight to be given to those and other relevant factors would vary from case to case. They were to include the following:

(a) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.

(b) The nature of the information, and the extent to which the subject matter is a matter of public concern.

(c) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

(d) The steps taken to verify the information.

(e) The status of the information. The allegation may have already been the subject of an investigation which commands respect.

(f) The urgency of the matter. News is often a perishable commodity.

(g) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will, not always be necessary.

(h) Whether the article contained the gist of the plaintiff's side of the story.

(i) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

(j) The circumstances of the publication, including the timing.

(10) Several matters have been the subject of debate since the decision in *Reynolds* was given, but the issues have to a large extent been resolved, particularly since the decision in *Jameel*. The first is the juridical status of the extension of privilege effected in *Reynolds*. Some have described it as 'a different jurisprudential creature from the traditional form of privilege from which it sprang': *Loutchansky v Times Newspapers Ltd (Nos 2–5)* [2001] EWCA Civ 1805; [2002] QB 783 at p 806 para 35, per Lord Philips of Worth Matravers MR, with whom Lord Hoffmann agreed in *Jameel* (para 46). Both Lord Philips in *Loutchansky (Nos 2–5)* at para 33 and Lord Hoffmann in *Jameel* at para 46 adopted the view that the privilege in such cases attaches to the publication itself rather than, as the traditional privilege cases, to the occasion on which it is published. Others take the view that the *Reynolds* privilege is built upon the foundation of the duty-interest privilege, an opinion adopted by Lord Bingham of *Cornhill*, Lord Hope of Craighead and Lord Scott of Foscote in *Jameel*. For the purposes of the present appeal the precise jurisprudential status of the *Reynolds* privilege is immaterial. What is significant is that it is plain in Their Lordships' opinion that the *Reynolds* decision was based, as Lord Bingham of Cornhill said in *Jameel* at para 35, on a 'liberalising intention'. It was intended to give, and in Their Lordships' view has given, a wider ambit of qualified privilege to certain types of communication to the public in general than would have been afforded by the traditional rules of law.

(11) The second disputed matter, which is germane to the present appeal, is whether the *Reynolds* defence is available only to the press and broadcasting media, or whether it is of wider ambit. In *Kearns v General Council of the Bar* [2003] EWCA 331; [2003] 1 WLR 1357 the Court of Appeal expressed the view that it was confined to media publications. That was not, however, necessary to the decision and Their Lordships are unable to accept that it is correct in principle. They can see no valid reason why it should not extend to publications made by any person who publishes material of public interest in any medium, so long as the conditions framed by Lord Nicholls as being applicable to 'responsible journalism' are satisfied. Lord Hoffmann so stated categorically in *Jameel* at para 54, and his opinion was supported by Lord Scott of *Foscote* at para 118 and, by inference at least, by Baroness Hale of *Richmond* at para 146.

(12) The third matter debated since *Reynolds*, and now specifically dealt with the House of Lords in *Jameel*, is how the factors set out by Lord Nicholls in describing responsible journalism in *Reynolds* are to be handled? They are not like a statute, nor are they a series of conditions each of which has to be satisfied or tests which the publication has to pass. As Lord Hoffmann said in *Jameel* at para 56, in the hands of a judge hostile to the spirit of *Reynolds* they can become ten hurdles at any of which the defence may fail, that is not the proper approach. The standard of conduct required of the publisher of the material must be applied in a practical manner and have regard to practical realities. The material should, as Lord Hope of Craighead said at paras 107–8, be looked at as a whole, not dissected or assessed piece by piece, without regard to the whole context.

[35] In the same vein, in *Grant v Torstar Corp* 2009 SCC 61, the Supreme Court of Canada said:

> [69] *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, marked a decisive departure from the traditional pro-reputation orientation of defamation law in England. The case involved allegations of improper dealing by an Irish politician. The House of Lords, for the first time, recognised that 'freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy', (p 621) and that the news media plays a vital role in furthering that interest. It followed that the law of defamation should provide greater protection to publications made on matters of public interest. A new standard was pronounced — responsible journalism. Effectively, the House of Lords recognised a compelling duty on the press to publish such reports and a corresponding interest on the part of the public in receiving them.
>
> [70] ...
>
> [71] *Reynolds* was quickly recognised as a 'media-friendly' development. In practical terms, however, *Reynolds* only partially succeeded in changing the landscape. The ten *Reynolds* factors proved difficult to apply. Some courts saw them as merely an illustrative list of possible considerations, while others viewed them as a complete code for what constitutes responsible journalism. Journalists and publishers, for their part, found it difficult to anticipate what kind of conduct would satisfy the *Reynolds* criteria, applied with the benefit of judicial hindsight (see eg RL Weaver; et al, *Defamation Law and Free Speech: Reynolds v Times Newspapers and the English Media* (2004), 37 Vand J Transnat'l L 1255, at pp 1303–07). As one commentator has observed:
>
> > ... the *Reynolds* defence virtually never succeeded because the ten pointers of responsible journalism were treated by the judges as hurdles to be surmounted. The judges applied a dollop of hindsight, finding something which they, as a responsible editor or journalist, would have done differently. The *Reynolds* defence spawned satellite litigation where, often for understandable reasons, the underlying facts could not be proved and much time and money had to be spent on analysing how the story was constructed. Anonymous sources tended to be viewed with suspicion and juries were given a complex list of factual issues to decide, sometimes with confusing directions as to the presumption of falsity which served to push them in the direction of disbelieving what the journalists said.
> >
> > (D Hooper, *The Importance of the Jameel Case*,[2007] 18 Ent LR 62 at p 62. See also AJ Bonnington, *Reynolds Rides Again*(2006), 11 Comms L 147).
>
> [72] The House of Lords addressed this uncertainty in *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44; [2007] 1 AC 359. The defendant Wall Street Journal Europe had published an article, shortly after 11 September 2001, revealing that the bank accounts of certain prominent Saudi Arabian businessmen, including the plaintiff, were being monitored for possible terrorist connections by Saudi authorities at the behest of the US

Government, citing anonymous sources. The tone of the article was neutral and unsensational, and the article bore the indicia of responsible journalism. Nonetheless, the trial judge denied the defendants access to the *Reynolds* privilege, and the Court of Appeal upheld that denial on the sole ground that the paper had not waited long enough to hear back from the plaintiff before running the story.

[73] The House of Lords reversed the judgment of the Court of Appeal and held that the responsible journalism defence applied. It criticised the lower courts for applying the *Reynolds* factors restrictively as 'a series of hurdles to be negotiated by a publisher' (para 33, per Lord Bingham), rather than as an illustrative guide to what might constitute responsible journalism on the facts of a given case. Given that the defence was meant to foster free expression and a free press, its requirements should not be pitched so high as to make its availability all but illusory. The House of Lords also emphasised that the assessment of responsible journalism is not an invitation for courts to micro-manage the editorial practices of media organisations. Rather, a degree of deference should be shown to the editorial judgment of the players, particularly professional editors and journalists. For instance, a court should be slow to conclude that the inclusion of a particular defamatory statement was 'unnecessary' and therefore outside the scope of the defence. As Lord Hoffmann put it:

> The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, ex hypothesi, in the public interest, too risky and would discourage investigative reporting (para 51).

The House of Lords also made clear that the defence is available to 'anyone who publishes material of public interest in any medium', not just journalists or media companies: *Jameel*, per Lord Hoftmann, at para 54; *Seaga v Wall Street Journal Europe* [2007] EHRLR 81.

[36] Again, on *Reynolds* privilege, Charlton J in *Leech v Independent Newspapers (Ireland) Ltd* [2007] 1 EHC 223 decided:

> A public interest defence can arise where the subject matter of a publication, be it an article or radio or television report, considered as a whole, was a matter of public interest ... there is a professional duty on the part of journalists to both seek out information that is of public interest and to impart it to the public and that while that is a matter of for professional skill and training, that it is also a matter of responsibility. And once a public interest is established in terms of the information the subject matter of the article, there is a second test to be met, which is as to whether on the evidence the steps taken to gather and publish the information were responsible and fair. The question may need to be put as to whether a newspaper, or a television channel or radio channel, on the evidence behaved fairly and responsibly in gathering and publishing the information. And that may indeed take into account some of the tests set out by Lord Nicholls in the *Reynolds* case (*Reynolds v Times*

Newspapers [2001] 2 AC 127; [1999] UKHL 45 (28 October 1999)). In particular ... whether the article contained the gist of the plaintiffs side of the story, and whether there was fair and responsible conduct ... the decision-maker ... has to have regard to the practical realities of news gathering. In that regard, I note what Lord Nichols says... that urgency can be a matter of importance in news reporting, which is, of course, dealing with a perishable commodity.

[37] The *Reynolds* privilege was considered and applied by the High Court in the case of *Tan Sri Dato' Tan Kok Ping, JP lwn The New Straits Times Press (M) Bhd dan lain lain dan satu lagi guaman* [2010] 2 MLJ 694; [2010] 3 CLJ 614. For myself, I would hold that this new defence is available to the defendants. I think we need to move with the times and we also need to view the situation with today's eyes. A number of countries with common law traditions comparable to those of Malaysia have moved in recent years to modify the law of defamation to provide greater protection for communication on matters of public interest. The *Reynolds* privilege represents a reasonable and proportionate response to the need to protect reputation while sustaining the public exchange of information that is vital to modern Malaysian society.

[38] It is clear that the law has begun to shift in favour of broader defences for press defendants, most prominently in England and Canada, but also in Australia (*Lange v Australian Broadcasting Corp* (1997) 145 ALR 96 (HC)); New Zealand *(Lange v Atkinson* [1998] 3 NZLR 424 (CA) ('*Lange v Atkinson No 1*'); *Lange v Atkinson* [2000] 1 NZLR 257 (PC) ('*Lange v Atkinson No 2*'); *Lange v Atkinson* [2000] 3 NZLR 385 (CA) ('*Lange v Atkinson No 3*')), and South Africa (*Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA))'.

[39] Reverting back to the case at hand, for the defence of qualified privilege in the form of the *Reynolds* privilege to apply, two requirements must be shown to exist, namely:

(a) that the publication concerned a matter of public interest; and

(b) that the steps taken to gather, verify and publish the information were responsible and fair ('responsible journalism') (see *Duncan and Neill on Defamation*, (3rd Ed), para 17.07, pp 205–206).

[40] I shall now deal with the question of whether or not the defence of qualified privilege in the form of *Reynolds* privilege applies to the instant case and can be relied on as a defence by the defendants.

WHETHER THE PUBLICATION WAS ONE OF THE PUBLIC INTEREST ('THE FIRST TEST')

[41] A matter is said to be of 'public interest' if the public had an interest in

matter, as opposed merely to being interested in matters. Being interested in matter would refer to matters which were merely titillating or salacious or gossipy. Matters which were of public interest, on the other hand included those which affect the public in terms of governance of their country, their safety, security and right to judge public representatives fairly on the basic of real information.

[42] Applying the principle to our present case, the plaintiff is a practitioner of traditional medicine/faith healer. The plaintiff's services are availed of by members of the public, and this was confirmed by the plaintiff (SP5) himself during cross-examination. As was also confirmed by the plaintiff (SP5) during cross-examination, a police report was lodged against him by one Abirame a/p Rajendiran (IDD4(B5)) alleging sexual improprieties committed by him on her. As a result the plaintiff was detained by the police for investigations on suspicion of committing rape, as confirmed by the head of the Johor Bahru South Criminal Investigations Section, District Police Headquarters, DSP Nor Hashim bin Mohamad (SD2).

[43] Thus, the conduct of a faith healer, whose services are availed of by members of the public, in so far as it raises misgivings about his genuineness, legitimacy and propriety, is a serious matter of public concern and interest. The fact that a police report (IDD4(B5)) was lodged against the plaintiff by a 12 year old girl alleging sexual impropriety and the fact that the plaintiff had been detained for investigations by the police on suspicion of raping her, as reported and published thereafter by the defendants in (exh P1(B6)), certainly concerned a matter or public interest. Therefore, the first test for the *Reynolds* privilege defence to apply has been fulfilled, that is to say, the publication (exh P1(B6)) has passed the public interest test.

WHETHER STEPS TAKEN TO GATHER, VERIFY AND PUBLISH THE INFORMATION WERE RESPONSIBLE AND FAIR ('THE SECOND TEST')

[44] Once the publication passes the public interest test, the next question for consideration is whether the steps taken to gather, verify an publish the information was fair and responsible. This second test has been described as the test of 'responsible journalism' (see *Duncan and Neill on Defamation* (3rd Ed) para 17.13, p 207).

[45] As stated earlier, in *Reynolds v Times Newspapers Ltd*, Lord Nicholls set out guidelines to be considered in deciding whether a publication should be protected by qualified privilege. He set out ten matters to be considered but emphasised that the list was not exhaustive and the weight to be given to each would vary from case to case. It must be reiterated and emphasised once again

that the guidelines above are to be regarded merely as pointers but are not to be treated as hurdles to be overcome by the publisher. A

[46] I will now apply the guidelines in the *Reynolds* case to the case at hand:

(a) *Seriousness of the allegation* B

(i) The allegation made was indeed serious as it concerned sexual impropriety or suspicion of rape by the plaintiff on a 12 year old girl, whose mother availed his services as a faith healer (exh IDD4(B5)) and (exh P1(B6)). C

(b) *The nature of the information and the extent to which the subject matter is of public concern*

(i) The information as testified by the journalist concerned Dinesh a/l Gerijan (SD1), was sourced from the victim's police report (exh IDD4(B5)) as well as DSP Nor Hashim bin Mohammad (SD2). Further, the subject matter was one of public concern. D

(c) *The source of the information* E

(i) SD1, the journalist who wrote the offending news report (exh P1(B6)), testified during examination-in-chief (SD1, Q & A 12) that he secured a copy of the victim's police report (exh lDD4(B5)) and read it himself. Confirmation that the plaintiff was detained for investigations on suspicion of rape was also given by DSP Nor Hashim bin Mohammad (SD2), Head of the South Johor Bahru Criminal Investigations Section, District Police Headquarters; F

(ii) In view of the above, the source of the information was reliable.

(d) *Steps taken to verify the information* G

Learned counsel of the plaintiff submits that the facts reveal that the journalist concerned (SD1) was in fact indifferent to the truth and was in fact reckless for the following reasons:

(i) First and foremost, there was completely no verification by SD1 by talking to the parents of the girl or to the girl herself for that matter. A little due enquiry would have revealed, for instance, that the mother of the girl had reported the day after her daughter's ie on 8 August 2007, that the daughter had in effect made a false report (please see report contained in bundle B p 4). Both reports ie the girl's and the mother's were lodged within 24 hours of each other at the same police station ie Pelangi Indah. Any reasonable person would have at least spoken to the mother bearing in mind the complainant here was of tender age at the alleged time of the incident. H I

(ii) SD1 admits having paid a visit with SD4 to 'investigate' the plaintiffs activities prior to the alleged incident. This visit however failed to reveal anything but the fact that the plaintiff's activity was completely legitimate even despite the visitors' attempt to lure him into giving SD4 (a female) a massage. SD1 even admits in his witness statement (Q28) that the defendant said that he would not give massages and that his reaction was 'pretty normal, cool and calm'. This in itself ought to have put SD1 on alert as everything appeared to be normal and above board.

(iii) SD1 admitted in cross-examination that the girl's mother's report was important in respect of the news published. SD1 also admitted that the fact that the girl was 'raped' does not appear in the police report. He further agreed that the allegations of mini harem and bodyguards do not appear in the report. SD1 also agreed that it was important to have spoken to the mother of the girl but admitted he did not do so.

(iv) Therefore it is abundantly clear that the reporter (SD1) here clearly acted recklessly and was indifferent to whether the so called 'allegations' were true or not.

Learned counsel of the defendants submits that SD1 took adequate steps, which were possible in the circumstances of that time, to verify the information. Learned counsel invites the court to consider the following matters:

(a) SD1 had testified during examination-in-chief that he first heard of the rape allegation by the complainant against the plaintiff at a press conference organised by the Johor Consumers Association on or around 7 August 2007 which he had attended (SD1, Q & A 7 & 8);

(b) SD1 further testified that prior to writing the offending news report (exh P1(B6)), he tried to ascertain if there was a police report lodged to back-up the allegations made by the complainant at the press conference. Having ascertained that there indeed was a police report, he secured the same and found it to be consistent with the allegations made at the press conference (SD1, Q & A 12 & 13); and

(c) SD1 went on to further testify that confirmation of the plaintiff's detention for investigations on suspicion of rape in connection with the police report lodged (exh IDD4(B5)) was also received from DSP Nor Hashim bin Mohammad (SD2), Head of the South Johor Bahru Criminal Investigations Section, District Police Headquarters.

In deciding this issue, it is well to bear in mind that the ten steps laid down in the *Reynolds* case for responsible handling of a story, such as checking sources and seeking comment from the subject of an allegation, were examples, not hurdles for the media to get over. The actual steps taken would be vary with the nature and sources of the information. In

my considered opinion, SD1 took adequate steps which were possible to verify the information. SD1 had good reason to think that the information was reliable; that he himself believed the information to be true and that he had done what he could, in the circumstances of that time, to check it. Of course, the burden rests on the defendants to show that publishing the information was reasonable in the circumstances. The High Court of Australia held in *Lange v Australia Broadcasting Corp* that the defendant's conduct 'will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify of the material and did not believe the imputation to be untrue' (p 118). In my judgment, the defendants had discharged this burden.

(e) *The status of the information*

(i) The police report (exh IDD4(B5)) was made on 7 August 2007. The plaintiff (SP5) confirmed during cross-examination that he was detained by police for investigations the very same day on 7 August 2007 and was only released a week later on 14 August 2007 on police bail. The offending news report (exh P1(B6)) published by the defendant on 10 August 2007 was therefore published at a time when the allegations were already the subject of investigations by the police. As such the allegations command respect and the information brought to SD1 has risen above mere rumors.

(f) *The urgency of the matter*

(i) The allegations in the instant case were made against the plaintiff, who is a practitioner of traditional medicine/faith healer, whose services are availed of by members of the public. Hence, the plaintiff's detention by the police on suspicion of rape and the allegations leveled were important news items which needed to be urgently communicated to the public who would be interested in the outcome. The urgency can be a matter of importance in news reporting.

(g) *Whether comment was sought from the plaintiff*

(h) *Whether the article contained the plaintiff's side of the story*

Both the above guidelines will be dealt with together since they are interrelated. Learned counsel of the plaintiff submits that the failure on the part of SD1 to seek a response from the person being defamed (plaintiff) establishes that SD1 had acted irresponsibly in attempting to verify the information. With respect, the court disagrees for the following reasons:

(i) As testified by the plaintiff (SP5) during cross-examination, he was detained by the police for investigations on 7 August 2007 and

released on police bail only on 14 August 2007, a week later. The offending news report (exh P1(B6)) was published on 10 August 2007, at a time when the plaintiff was under police detention;

(ii) The journalist concerned (SD1) testified during chief that it was actually his intention to set out the plaintiff's side of the story and to obtain his response and comments prior to writing the news report on 9 August 2007 (which was published on 10 August 2007). He was however unable to do so as the plaintiff was already under detention by the police (SD1, Q & A 14 & 15);

(iii) The defendant have therefore provided a valid and excusable reason as to why their journalist concerned (SD1) was unable to seek the plaintiff's comments and publish his side of the story. This was largely due to the fact that the plaintiff was unavailable. This according to *Duncan and Neill on Defamation* (3rd Ed) is hence not an inflexible requirement (see *Duncan and Neill on Defamation* (3rd Ed) para 17.18, p 209].

(i) *The tone of the article*

(i) When read as a whole and in its context, the news report merely sets out allegations leveled against the plaintiff. The contents are not set out and adopted as statements of fact;

(ii) SD1, the journalist who wrote the article also testified during examination-in-chief that he went about writing the news report in a measured tone so as to ensure it was not accusatory. He also testified that the contents were set out as allegations and not as statements of fact adopted by the defendants (SP1, Q & A 16).

(j) *Circumstances of the publication including timing*

(i) The offending news report (exh P1(B6)) was published in 10 August 2007 after adequate measures were first taken to verify that the allegations were indeed made and that the police had indeed detained the plaintiff for investigations on suspicion of rape, in connection with the police report lodged. The police report was lodged on 7 August 2007 (exh IDD4(B5)). The plaintiff was detained by the police on the same day on 7 August 2007 as mentioned earlier. SD1 received confirmation of the plaintiff's detention, prior to publishing the offending news report, from DSP Nor Hashim Mohammad (SD2), and the actual publication took place only on 10 August 2007, some three days after the plaintiff had been detained, and hence negating any suggestion that the defendants had acted nastily.

[47] In view the reasons above stated, I am of the considered opinion that the steps taken to gather, verify and publish the information was indeed responsible and fair in the circumstances. As such, the defendants have also passed the second test in order to be able to successfully establish the defence of *Reynolds* privilege.

[48] Both the first and second tests having been passed, the defendants are entitled to rely on the defence of qualified privilege (*Reynolds* privilege). The news report (exh P1(B6)) is therefore protected by privilege and is immune from suit as it was published on an occasion of qualified privilege.

MALICE

[49] The defence of qualified privilege is qualified, as its name suggests, and ordinarily can be destroyed if the plaintiff is able to raise and prove that the defendants were motivated by express malice. The onus in proving actual or express malice lies with the plaintiff (see *Hoe Thean Sun & Anor v Lim Tee Keng* [1999] 3 MLJ 138; *Tan Sri Dato' Tan Kok Ping, JP lwn The New Straits Times Press (M) Bhd dan lain lain dan satu lagi guaman*).

[50] There has not been any evidence whatsoever of actual or express malice which the plaintiff has been able to raise or prove during the course of trial in order to destroy to the defence of qualified privilege raised by the defendants. Further, at the outset of trial on 8 July 2009, learned counsel for the defendants had objected to certain questions and answers tending to show malice contained in the plaintiff's witness statements, specially SP4 (Q & A 7–12) and SP5 (Q & A 15–23) ('the said Q & As') for failure by the plaintiff to comply with O 78 r 3(3) of the Rules of the High Court 1980. This rule requires that where the plaintiff intends, to allege that the defendants was actuated by express malice, he is required to set out in his reply, facts and matters from which the malice is to be inferred. This, the plaintiff had failed to do — he had failed to set out the facts and matters relating to the said Q & As in his reply. After hearing submissions and arguments on this point and considering the several authorities tendered, on 14 July 2009, the court ruled that the plaintiff is to be prevented from raising evidence of malice by way of the said Q & As and ordered them to be struck out from SP4 and SP5 (see *Nirumalan K Pillay & Ors v A Balakrishnan & Ors* [1997] 1 SLR 322; *Halim bin Arsyat v Sistem Televisven Malaysia Bhd & Ors* [2001] 6 MLJ 353; *Dato' Wan Hashim bin Hj Wan Daud v Mazlan bin Ibrahim & Anor* [1998] 1 MLJ 176 and *Dato' Seri S Samy Vellu v Penerbitan Sahabat (M) Sdn Bhd & Anor (No 3)* [2005] 5 MLJ 561).

[51] In any case, where the defence of qualified privilege relied on is the *Reynolds* privilege species, as in the instant case, malice has no part to play and is irrelevant (see *Duncan and Neill on Defamation* (3rd Ed) para 17.27, pp 213–214).

[52] In *Bonnick v Morris & Ors* [2003] 1 AC 300 at para 14, Lord Nicholls said in relation to the defence of *Reynolds* privilege:

> (Counsel) rightly accepted that malice does not arise as an independent issue. Matters relating to malice are to be considered in the context of deciding whether the publication attracted qualified privilege in accordance with common law as developed by the decision of the House of Lords in *Reynolds v Times Newspapers Ltd*.

[53] Further, in *Jameel*'s case, Lord Haffmann said:

> There is no question of privilege being defeated by proof of malice because the propriety of conduct of the defendant is built into the conditions under which material is privileged.

[54] It is therefore clear that when reliance is placed on the defence of *Reynolds* privilege and the defence is shown to be successfully made out, the question of malice is immaterial.

CONCLUSION

[55] By adopting the 'responsible journalism' defence, the court is required to balance the defendants' interest in freely disseminating information and the public's interest in the free flow of information against the plaintiff's interest in protecting his reputation. Each of these is a complex value protected by our laws. Weighing these often competing legal interests is a highly complex legal determination with constitutional dimensions. I am persuaded that in this case that the news report published by the defendants is in the public interest and it is responsibly made. In short, I would call it 'responsible investigative journalism'.

[56] For the reasons stated, the defendants' defence should succeed in this case as the principle involved is more important than the particular facts of the case itself. The *Reynolds* privilege says that if the subject matter or a news report or an article or broadcast was sufficiently in the public interest and the journalist who had written it behaved responsibly in doing so, the defence will succeed. However, I hesitant to add that this defence operates particularly harshly against the plaintiff/claimant because its success prevents the plaintiff/claimant from vindicating his reputation.

[57] I would, therefore, dismiss the plaintiff's claim herein with costs.

Plaintiff's claim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed